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CHARLES ELMORE CRO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 321, 322

JOHN H. CHATZ, TRUSTEE IN BANKRUPTCY OF HOWARD HABERMAN, DOING BUSINESS AS THE CLUB STORE AND MORTON CLOTHIERS, BANKRUPT,

Petitioner,

vs.

ARMOUR PLANT EMPLOYEES CREDIT UNION, A CORPORATION,

Respondent.

JOHN H. CHATZ, TRUSTEE IN BANKRUPTCY OF HOWARD HABERMAN, DOING BUSINESS AS THE CLUB STORE AND MORTON CLOTHIERS, BANKRUPT,

Petitioner,

vs.

ANDREW A. TODD, CHELSEY H. TALLEY AND ARMOUR PLANT EMPLOYEES SERVICE BUREAU, A CORPORATION,

Respondents.

PETITION FOR REHEARING.

JOSEPH ROSENBAUM,
Counsel for Petitioner.

HARRY H. RUSKIN,
JEROME S. WALD,
Of Counsel.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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PETITION FOR REHEARING.

Now comes John H. Chatz, trustee in bankruptcy of Howard Haberman, doing business as The Club Store and Morton Clothiers, bankrupt, by Joseph Rosenbaum, his counsel herein, and prays that a rehearing be granted, and

that on such rehearing the court vacate its order, entered in this cause on the 14th day of October, 1946, denying his petition for writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, and enter an order either granting the writs of certiorari as prayed in his petition for said writs, or in the alternative, granting the writs of certiorari limited to the first question presented in his said petition for said writs of certiorari.

In support of this petition for rehearing the following is respectfully submitted.

1. The findings of fact of the district court support its money judgment for petitioner. The reversal in the court below by a divided court was solely because the court believed that the *evidence* did not sustain the facts as found. Except for the authority assumed by it under Rule 52(a) of the Federal Rules of Civil Procedure for the District Courts of the United States, the court below had no authority under the acts of Congress on the subject of review in the circuit courts of appeals to determine other than whether the facts as found supported the judgment. *State Farm Ins. Co.* v. *Coughran,* 303 U. S. 485, 487.

2. The first question in the petition for writs of certiorari, whether Rule 52 (a) for the district courts supersedes the statutes denying the authority of the circuit courts of appeals to reverse judgments of the district courts for errors in fact, is dispositive of the cause at bar without the need for any consideration of the evidence or the merits of this cause. If the question is answered in the negative, that no change in appellate authority has been effected by the rule, the judgment of the court below (except possibly as to interest alone) would without more have to be reversed and that of the district court affirmed, as the findings of fact do support its judgment.

3. If this court will see fit to grant and limit certiorari

to the first question presented, it can set at rest a question lying at the very foundation of federal appellate practice,—one of vital national importance affecting the administration of justice by an important branch of the judiciary and of substantial professional interest to members of the bar that, in their representation of litigants in the district courts, they may properly consider the desirability and effect of a waiver of a trial by jury in the event of a review of the judgment of the district court. The subject was not free from doubt at the very inception and creation of the Federal Rules of Civil Procedure, as is evidenced by the Report of the Advisory Committee on Rules for Civil Procedure, April 1937, page 149.

As pointed out above, a decision on this question alone can dispose of this cause without going beyond the findings of the district court, and will serve the salutary purpose of determining the status in the circuit courts of appeal of a review which, although in form an appeal, is nonetheless, by express statutory mandate, in substance a writ of error with all the limitations of such a writ.

Historically, there could be no review by writ of error of the judgment of a district court in law actions tried to the court without a jury. Such trials are held not to be judicial acts but arbitrations and therefore not reviewable on such a writ. *Campbell* v. *Boyreau,* 21 How. 223, 226-7.

It was only by virtue of the Act of March 3, 1865, ch. 86, 13 Stat. 501, that the reviewing court was empowered to review the judgments in such cases on writs of error; and the statute granting the authority imposed also the limitations that the findings of the trial court have the effect of a jury's verdict and that when the findings are special the review may extend to the determination of whether the findings of fact support the judgment. Reversal upon a writ of error for any error in fact was long prohibited by statute.

This statute was incorporated in the U. S. Revised Statutes and in the U. S. Code, Title 28, sections 773, 875 and 879 (quoted in Appendix, at pages 28, 29, to Petition for Writs of Certiorari), and are still the law but for the assumed conflict of Rule 52(a).

It is submitted that the writ of error in substance and with its limitations are still with us. U. S. Code, Title 28, sections 861a and 861b, Act of January 31, 1928, ch. 14, 45 Stat. 54, section 1, and section 2 as amended by Act of April 26, 1928, ch. 440, 45 Stat. 466. The jurisdiction of the circuit courts of appeals under section 128 of the Judicial Code as amended by the Act of February 13, 1925, ch. 229, 43 Stat. 936, and the statute creating it, Act of March 3, 1891, ch. 517, 26 Stat. 826, sections 2, 6 and 11, extends to writs of error (now in the form of an appeal) in accordance with the provisions of law regulating the method and system of review through such writs.

Upon such an appeal there may not be any reversal for errors in fact. This limitation, inherent in the review on a writ of error, is preserved on this appeal by U. S. Code, Title 28, section 861b. Whatever the desirability for greater review, the circuit courts of appeals are forbidden to reverse for errors in fact on the appeals substituted for writs of error over which jurisdiction has been vested in them; and this cannot be enlarged by a rule promulgated for the district courts.

The findings of the district court being adequate to support its judgment, the court below had no authority to reverse it for error in fact. Rule 52(a) cannot enlarge this limitation upon the court below in its review under an appeal pursuant to U. S. Code, Title 28, sections 861a and 861b.

Many cases, in substance actions at law, are being tried under the Federal Rules of Procedure in the district courts

and will be taken to the circuit courts of appeals for review as authorized by said sections 861a and 861b. It is of tremendous importance to litigants to know their rights with respect to appeals and the authority of the circuit courts of appeals, that their cases may be properly considered, presented and tried, and they be able to weigh and determine whether or not a jury trial should be waived, in the light of the right of the reviewing court to reverse for errors in fact and its not having the benefit of the personal observation of the witnesses and parties testifying at the trial.

It is therefore prayed that a rehearing be granted, and that on rehearing an order be entered at least granting the writs of certiorari as prayed by petitioner limited to the first question presented in his petition for said writs.

JOHN H. CHATZ, trustee in bankruptcy of Howard Haberman, doing business as The Club Store and Morton Clothiers, bankrupt,

Petitioner,

By JOSEPH ROSENBAUM,
Counsel for Petitioner.

HARRY H. RUSKIN,
JEROME S. WALD,
Of Counsel.

I, JOSEPH ROSENBAUM, counsel for the petitioner herein, due hereby certify that the foregoing petition for rehearing is presented in good faith and is not interposed for delay.

JOSEPH ROSENBAUM.